

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

ORIGINAL

77-2034

To be argued by
RICHARD H. GIRGENTI

United States Court of Appeals

For the Second Circuit

GEORGE KAPLAN,

Petitioner-Appellant,

against

ROY BOMBARD,

Superintendent, Greenhaven Correctional Facility,

Respondent-Appellee

**On Appeal from the United States District Court
for the Southern District of New York**

**BRIEF FOR
RESPONDENT-APPELLEE**

ROBERT M. MORGENTHAU

District Attorney

New York County

Attorney for Respondent-Appellee

155 Leonard Street

New York, New York 10013

(212) 732-7200

PETER L. ZIMROTH

RICHARD H. GIRGENTI

Assistant District Attorneys
Of Counsel

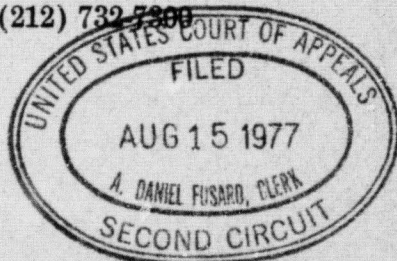


TABLE OF CONTENTS

	PAGE
Questions Presented	1
Preliminary Statement	3
Background	3
The Evidence at Trial	5
The People's Case	5
A. The Palace Fire—the Plan, the Arson and Its Aftermath	6
B. The French Model Studio Fire—the Threats to Valentine, the Plan, the Arson and Its Aftermath	8
The Defense Case	12
The Post-Conviction Motion and the Hearing in State Court	16
The State Trial Court's Decision on the Post-Con- viction Motion	17
The Decisions of the Appellate Division and the State Court of Appeals	18
The District Court Decision on the Petition for a Writ of Habeas Corpus	19
Point I—Appellant Kaplan was not deprived of the effective assistance of counsel or prejudiced by any conflict of interest caused by his trial attor- ney's representation of him and an acquitted co- defendant	20

	PAGE
Point II—Appellant knowingly and intelligently waived any claim of possible prejudice from joint representation	30
Point III—Appellant is not entitled to any eviden- tiary hearing before the District Court	42
Conclusion	43

TABLE OF AUTHORITIES

Cases:

Chavira Gonzales v. United States, 314 F. 2d 750 (9th Cir. 1963)	26
Faretta v. California, 422 U.S. 806 (1975)	35
Glasser v. United States, 315 U.S. 458 (1973)	21, 35 39, 41
Hill v. State, 316 A.D. 2d 557 (Del. Sup. Ct. 1974)	38
Johnson v. Zerbst, 304 U.S. 458 (1973)	35
Kaplan v. Bombard, 76 Cir. 2435, Slip Op. at 14 (S.D.N.Y. January 3, 1977)	24, 26, 27
Kaplan v. United States, 375 F. 2d 895 (9th Cir. 1967) ..	38
LaFleur v. Hall, 383 F. Supp. 1188 (D.C. Mass. 1974) ..	39
LaValle v. Delle Rose, 410 U.S. 690 (1973)	20
People v. Gomberg (and Kaplan), 46 A.D. 2d 850 (1st Dept. 1974)	4, 18
People v. Gomberg (and Kaplan), 38 N.Y. 2d 307 (1975)	4, 19, 20, 26, 36, 37, 38, 40, 42
People v. Gonzalez, 30 N.Y. 2d 28 (1971), <i>cert. denied</i> , 409 U.S. 859 (1972)	26

	PAGE
Schneckloth v. Bustamonte, 412 U.S. 218 (1974)	35
United States v. Alberti, 470 F. 2d 878 (2d Cir. 1973)	21
United States v. Armedo-Sarimiento, 524 F. 2d 591 (2d Cir. 1975)	35
United States v. Armone, 363 F. 2d 385 (2d Cir. 1966) <i>cert. denied</i> , 385 U.S. 957 (1966)	25, 38
United States v. Carrigan, 543 F. 2d 1053 (2d Cir. 1976)	21, 26
United States v. DeBerry, 487 F. 2d 448 (2d Cir. 1973)	21, 26, 35, 38
United States v. Foster, 496 F. 2d 1 (1st Cir. 1972)	39
United States v. Lovano, 420 F. 2d 769 (2d Cir. 1970), <i>cert. denied</i> , 397 U.S. 1071 (1970)	21, 25
United States v. Mandell, 525 F. 2d 871 (7th Cir. 1975)	39
United States v. Mari, 526 F. 2d 117 (2d Cir. 1975)	21, 38
United States v. Marshall, 488 F. 2d 1169 (9th Cir. 1973)	26
United States ex rel. Sabella v. Follette, 432 F. 2d 572 2d Cir. 1970), <i>cert. denied</i> , 401 U.S. 920 (1971)	20
United States v. Sheiner, 410 F. 2d 337 (2d Cir. 1969)	25, 38
United States v. Vowteras, 500 F. 2d 1210 (2d Cir. 1974)	21
United States v. Wisniewski, 470 F. 2d 274 (2d Cir. 1973)	21, 27, 38
Winford v. Swenson, 517 F. 2d 1114 (8th Cir. 1975)	20

Statutes and Other Authorities:

ABA Standards relating to the Defense Function §3.5 (a), (b)	37
Code of Professional Responsibility, EC 5-16, DR 5-101 (A); DR 5-105 (B), (C)	37
28 U.S.C. §2254 (d)	20

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On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR RESPONDENT-APPELLEE

Questions Presented

1. Was defendant denied the effective assistance of counsel because his lawyer also represented two codefendants when:

a. The People's evidence detailed the equal responsibility of all defendants;

b. The primary defense of all defendants was to discredit the People's witness and defense counsel pursued this course vigorously; and

c. At no time did any of the individual defenses conflict.

2. Whether a defendant knowingly and intelligently waived any claim of possible prejudice from joint representation when he never asked for separate counsel in spite of the following:

a. Prior to trial, both the trial judge and defense counsel alerted defendant to the possibility of a conflict of interest arising from joint representation;

b. The defendant was present in court and heard his attorney represent that they had discussed the possibility of a conflict of interest and nonetheless defendant had consented to continued representation; and

c. The trial judge gave defendant the opportunity to retain new counsel either for representation or consultation, at any time during the course of the trial, if defendant believed that any conflict or prejudice arose as a result of the joint representation.

3. Whether this Court should remand for an evidentiary hearing when:

a. Defendant did not request an evidentiary hearing in District Court;

b. The issue defendant wants determined at the hearing is not critical to the issue in this case; and

c. Defendant has been afforded a full and fair hearing in the state trial court on the question of whether he was effectively represented.

Preliminary Statement

This is an appeal by petitioner George Kaplan from an order of the United States District Court, Southern District of New York (Goettel, J.), entered on January 3, 1977, denying, without an evidentiary hearing, Kaplan's petition for a writ of habeas corpus. A certificate of probable cause for appeal was issued, and petitioner filed a timely notice of appeal. Kaplan is presently incarcerated in the Greenhaven Correctional Facility, Stormville, New York. It is conceded that he has exhausted his state remedies.

Background

In July of 1973, petitioner George Kaplan, along with Jerry Gomborg and Martin Hodas, was indicted by a New York County Grand Jury. Indictment No. 3553-75. By this indictment, Kaplan and his codefendants were charged with arson in the second degree and criminal mischief for their participation in setting two fires at midtown Manhattan massage parlors—one on May 10, 1972 at the Palace massage parlor and another on July 25, 1972 at the French Model Studio massage parlor.

On December 12, 1973, the trial of all three defendants, who were represented by the law firm of Kassner and Detsky, commenced before Justice Denzer. On December 20, 1973, the jury found the defendants Kaplan and Gomborg guilty of both counts of arson in the second degree. Martin Hodas was acquitted.

In a post-trial motion dated February 14, 1974, Kaplan and Gomberg asked that their convictions be set aside on the grounds, *inter alia*, that there was a conflict of interest caused by their attorney's representation of them and his representation of their codefendant Martin Hodas. An extensive evidentiary hearing was held on this motion before Justice Denzer on February 28, 1974. On April 19, 1974, following the conclusion of the hearing, the court orally denied the motion.

That same day, Kaplan was sentenced to an indeterminate term of imprisonment with a maximum of seven years (Denzer, J.). On December 3, 1974, the Appellate Division, First Department, of the Supreme Court of the State of New York, unanimously affirmed, without opinion, the judgment of conviction. *People v. Gomberg (and Kaplan)*, 46 A.D. 2d 850 (1st Dept. 1974). On December 29, 1975, the New York State Court of Appeals in an opinion by Judge Jasen, unanimously affirmed the Appellate Division's order of affirmance. *People v. Gomberg (and Kaplan)*, 38 N.Y. 2d 307 (1975).

On June 17, 1976, Kaplan filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York, arguing as he did in state court that he was deprived of the effective assistance of counsel because of a conflict of interest in his attorney's representation of him and an acquitted codefendant (Hodas). The record before the District Court included the decisions of the state trial court and the New York State Court of Appeals, a complete transcript and copies of all motions and affidavits in the pre-trial, trial and post-

trial state proceedings, as well as affidavits by petitioner's and respondent's attorneys in support of and in opposition to the petition for a writ of habeas corpus.* On January 5, 1977, Judge Goettel denied Kaplan's petition for a writ of habeas corpus.

On this appeal, Kaplan contends that the District Court erred in not granting his petition for a writ of habeas corpus. Specifically, he argues that his constitutional rights under the Sixth and Fourteenth Amendments were violated in that his attorney's joint representation of him and his co-defendant Hodas created a conflict of interest which prejudiced appellant and deprived him of effective assistance of counsel. Kaplan further argues that he did not knowingly and intelligently waive his right to be effectively represented by an attorney who was not subject to a conflict of interest. Finally, he argues that the District Court erred in not according him a factual hearing on his petition for a writ of habeas corpus.

THE EVIDENCE AT TRIAL

The People's Case

At trial, the People's case consisted largely of the testimony of three accomplices—**Dexter Morton, Christopher Hatton** and **Earl Jones**. The evidence established that the three were employees of the defendants—Gomberg, Kaplan

* A copy of the transcript of the state proceedings was included as part of the record on this appeal. All numerical references preceded by "R" are to this transcript. In addition, appellant has prepared an appendix which includes copies of all the relevant papers before the state trial court and the District Court, as well as copies of part of the transcripts of the state proceedings. All numerical references preceded by "A" are to Appellant's Appendix.

and Hodas—at the Geisha House, a midtown Manhattan massage parlor owned and operated by the defendants (R. 140, 142, 400, 623). As expressed in numerous meetings and discussions in the spring and summer of 1972, the defendants were extremely disturbed that two competitor midtown massage parlors—the Palace and the French Model Studio—were charging lower prices than the Geisha (R. 140-43, 156-57). Eventually, Gomberg, Kaplan and Hodas decided they would have their competitors burned down (R. 149-50). The defendant's employees—Morton, Hatton and Jones—were the paid accomplices who actually set the fires at the Palace and French Model Studio.

**A. The Palace Fire — the Plan,
the Arson and Its Aftermath**

In the latter part of April of 1972, Gomberg, Kaplan and Hodas first met with Dexter Morton and Christopher Hatton to discuss how they would put the Palace massage parlor out of business (R. 140-43, 145, 462-63). All three defendants discussed how the Palace was cutting into the business at the Geisha House by charging lower prices (R. 140-43). At this first meeting, Hatton suggested that he “break” up the interior of the Palace, but Hodas vetoed this idea (R. 145).

During the next few weeks the defendants continued their discussions about putting the Palace out of business. Eventually, the defendants told Hatton that they wanted him to set fire to the Palace (R. 149-50). They suggested he “scorch up” the front of the Palace, and Hodas gave Hatton a diagram from which he could make a fire bomb (R. 149, 294-95). In the presence of Morton and all three

defendants, Hatton built the fire bomb (R. 147-49, 294-95, 411, 493-95).

One of several conversations, held in late April or early May, between Hatton and the defendants, was overheard by Dexter Morton (R. 407). During this conversation, Hodas, in the presence of Kaplan and Gomberg, discussed setting the Palace on fire (R. 407).

At various times, Hatton was told by each of the defendants that he would receive \$300 or \$500 (the price fluctuated) for setting the Palace on fire (R. 151, 321).

Although Hatton made the fire bomb, he was not anxious to set the Palace on fire (R. 317). When Hatton again suggested that he "break up" the massage parlor rather than set it on fire, Kaplan accused him of not having "any guts" (R. 151). Hodas added that if Hatton would not do the job, the defendants would get someone else to do it (R. 152). Gomberg suggested that Hatton could get the "nigger" (Dexter Morton) to do it. As Gomberg put it, "He (Morton) will do anything you (Hatton) say" (R. 152).

At a later time, Hatton overheard Gomberg offer Morton money to burn down the Palace (R. 321).

Eventually, on May 9, 1972, at the Geisha, Kaplan, having grown impatient, told Morton to set the Palace on fire that night (R. 404). As an incentive, Gomberg promised Morton \$300 and a plane ticket to Atlanta (R. 405-06).

In the early morning hours of May 10th at approximately 5:30 a.m., Morton broke into the Palace and, using

the fire bomb made by Hatton, set fire to the premises (R. 400-03, 411-12). After setting the fire, Morton called Kaplan to let him know that the fire had been set (R. 407-08). On his way to work that morning, Chris Hatton saw that the Palace had been set on fire and he also called Kaplan to tell him about the fire (R. 154).

The defendants were pleased with the results. The morning after the fire both Chris Hatton and Dexter Morton were congratulated by Kaplan and Gomberg who said Morton had shown "a lot of heart" (R. 155). When Hodas met Morton and Hatton later in the day, he congratulated Hatton for a "good job" and shook Morton's hand (R. 155). According to Morton, that same day, in the afternoon, Gomberg drove Morton to the West Side Terminal where Gomberg purchased a roundtrip plane ticket to Atlanta for Morton (R. 409). Morton also testified that, on the day before he flew to Atlanta, Gomberg gave him \$200 and gave Chris Hatton \$100 (R. 409-10).

B. The French Model Studio Fire — the Threats to Valentine, the Plan, the Arson and Its Aftermath

After the Palace fire, the defendants continued in their efforts to eliminate their competition in the massage parlor industry. They now turned their attention to **Nick Valentine** who had recently dissolved his partnership with the defendants and had assumed the ownership of the competitor French Model Studio (R. 46, 47, 94-96).

According to Nick Valentine, early in July of 1972, he had a 45-minute meeting with Gomberg, Kaplan and Hodas (R. 46, 47, 94, 96). At this first of two meetings with

Valentine, Hodas said "they (the defendants) were trying to organize the whole town and * * * everyone had to fall in step or else" (R. 47). Hodas added that Valentine "was out of step with everybody else" and that "he had to get in line and straighten out," otherwise "the same thing would happen that happened in the Palace" (R. 48). Gomberg joined Hodas in making this point (R. 48). Kaplan accused Valentine of being "stupid and stubborn" for the prices he was charging at the Studio (R. 48).

During the next few weeks in July, the defendants had several meetings at which they discussed how they would carry out their threats to Valentine. During these meetings the defendants said they wanted Hatton to set the Studio on fire (R. 158). As he had during the discussions prior to the Palace fire, Hatton suggested he should "breakup" the Studio instead of setting it on fire (R. 158). Apparently the defendants at first agreed with Hatton's suggestion, for Hatton and Gomberg then purchased a crow bar and sledge hammer, which they stored behind a counter at the Geisha House (R. 158, 159).

However, in a later conversation at the Geisha House, Gomberg, in the presence of Dexter Morton, Kaplan and Hodas, once again suggested that Hatton should "scorch up" the front of the Studio (R. 160). Both Hodas and Kaplan agreed with Gomberg's suggestion (R. 160). Additionally, Kaplan warned Hatton, "if you go to do it, do it right and don't screw it up" (R. 160). Gomberg and Kaplan then told Hatton and Morton that they would each be paid \$100 for setting the fire (R. 161, 162, 418). ... -

According to Dexter Morton and Earl Jones, several days before July 25th, they saw Jerry Gomberg and Chris Hatton carry a container of gasoline into the Geisha from Gomberg's car (R. 519, 645, 646). In front of the Geisha House, Jones overheard Kaplan, in the presence of Gomberg, order Morton and Hatton to burn down the Studio (642-645).

The defendants were growing impatient. On July 24th Gomberg and Kaplan met with Morton. They complained about his failure to set the fire at the French Model Studio, and told him, "if you can't do it we will get somebody else to do it. It's got to be done. (We have) to have this guy closed for a couple of days" (R. 416-18).

On this same day, Earl Jones overheard Hodas tell Kaplan that Hatton and Morton were "messing around the job" and that it should have been done a week ago (R. 626, 627). Thereafter, Kaplan directed Jones, in the presence of both Hodas and Gomberg, to set the door of the French Model Studio on fire to "put a scare into those people so that they will know that we mean business" (R. 624, 625, 640). Gomberg added that "it should have been done a long time ago" (R. 625).

That night Dexter Morton met Earl Jones at a bar. Jones said that he had been asked by Kaplan to "take care of" the Studio (R. 504). Morton told Jones not to get involved (R. 504). However, Jones rejected this advice whereupon Morton said, "If you do it, call me at the Harem Hotel and I'll come down and make sure you call the fire department" (R. 504).

In the early morning hours of July 25th Jones, who appeared to be "a little high" from drinking, went into the Geisha House where Chris Hatton had been sleeping (R. 334-335). There, Jones took the container of gasoline and some newspapers (R. 335), and went to the French Model Studio where he poured gasoline on the front door and lit it (R. 623). He then returned to the Geisha House and called Morton at about 4:30 or 5 a.m. to tell him what he had done (R. 504, 508, 509, 624). Morton then called Kaplan and told him that the fire had been set (R. 504, 505, 509).

After receiving a telephone call from Earl Jones, Morton met with him at the Geisha House (R. 624). At approximately 6 a.m., they went to the Studio, where the front door had been burned (R. 509). Jones said that he had been instructed by Kaplan to scorch the door only. Nonetheless, Morton said that Jones had not done a good job and that Kaplan would be angry (R. 655). Morton said he would have to complete the job (R. 505). Then Jones gave Morton some gasoline which had been left beside the building (R. 413-15, 505). Morton kicked in the door, entered the premises, poured the gasoline on the carpet, sofa and walls and set them on fire (R. 413-15, 505, 626, 652).

The defendants gave mixed reviews to the Studio fire. On the day of the fire, Kaplan expressed his dissatisfaction over the manner in which the fire had been set. He told Morton that he had not done a good job (R. 419, 565). Earlier in the day, before Kaplan and Gomberg talked with Hodas, Hodas congratulated Morton and told Morton that he would like to shake the hand of the man who "took care

of Nick's place" (R. 420, 566). Afterwards, Chris Hatton heard all three defendants, who were apparently upset and angry, talking about how the fire had not been set properly (R. 163-64). The defendants were concerned that the fire had not burned properly and were fearful that someone might have seen the fire set (R. 163-64). Eventually, Gomberg and Kaplan terminated Jones' employment because "[the fire] didn't go off right" (R. 339).

A few weeks after the Studio fire, Nick Valentine had a second meeting with the defendants at the Dixie Hotel (R. 49). Kaplan again said that Valentine was "stupid and better get in line with the rest of the people" (R. 50). Gomberg warned Valentine to "wise up" or they would "just keep burning [him] out" (R. 50). Hodas added that he owned 42nd Street and that there was no place on it for Valentine any more (R. 50).

The Defense Case

The defense, in its vigorous cross-examination of the People's witnesses and in its own direct case, attempted to discredit the veracity of the People's witnesses. In addition, the defendant Hodas presented evidence, which was contradicted, that he was merely a landlord of the Geisha House, not an owner, and thus had no monetary motive to set fire to competitor massage parlors. The three witnesses for the defense were attorney Herbert Kassner, Esq., Herbert Levin and defendant Martin Hodas.

Herbert S. Kassner, counsel for the defendants, testified that he was present at the Geisha House when the fire marshals executed a search warrant (R. 746-47). Accord-

ing to Kassner, the fire marshals searched the premises of the Geisha House and found a small white jug, about six inches high and containing an ignitable liquid (R. 746-47). Kassner testified that the jug was filled to "the very top with some substance" (R. 747). Kassner's testimony conflicted directly with the testimony of Fire Marshal Thomas Borchik who testified that the jug contained gasoline and was only three-quarters full (R. 735-37).

Herbert Levin, who managed several of the corporations of which Hodas was the president, testified that he kept the books and records and paid bills for these corporations (R. 764). He testified that "as far as I know" Hodas did not have any interest in the Geisha House during the months from April to July of 1972; Hodas merely sub-leased the premises to the owners of the Geisha House (R. 765).

On cross-examination, however, Levin testified that he was not aware of any written agreement that Hodas entered into for joint ownership of the Geisha House (R. 806). Levin was then shown a signed agreement among Valentine, Gomberg, Kaplan and Hodas (Exh. 2) stating that each had a 25% interest in the Geisha House (R. 805-06). This agreement was written on the stationery of the East Coast Signomatic Corporation, which Levin admitted was stationery belonging to a company of which Hodas was president (R. 806-08). Although Levin admitted that that company was known to him and was in business when he worked for Hodas, he denied that he knew of any money paid to Hodas pursuant to this partnership agreement (R. 806-08).

In contradiction of Nick Valentine's testimony about his first meeting with the defendants at the Dixie Hotel,

Levin also testified on direct examination that sometime prior to May, 1972, he was present at a meeting held in the Dixie Hotel (R. 769-79, 795), at which Nick Valentine, John Shocker (or Shooker) and the defendants were present (R. 781-82). Levin testified that Shocker, who had previously threatened Hodas for throwing Valentine out of the partnership in the Harem massage parlor, now said that he was "looking out for Nick's interest and that if Marty (Hodas) didn't straighten out * * * he would be in trouble" (R. 782-84). Valentine was apparently complaining that although he had had an interest in the Geisha and the Harem massage parlors, Hodas had thrown him out (R. 782-83). Levin did not hear any of the defendants threaten Valentine (R. 785).

Levin was present in the summer of 1973 when Chris Hatton went to Hodas' office to talk about the fire (R. 817-18). Hatton also visited Hodas several weeks before the trial in December of 1973 (R. 819-20). Hodas never mentioned to Levin that Hatton had asked him for money not to testify about the fires (R. 820-21).

Martin Hodas testified that in November or December of 1971 he entered into an agreement with Valentine, Gomborg and Kaplan for joint ownership of the Geisha House; the agreement was terminated six to ten months later (R. 828-29). On cross-examination, when he was shown a copy of the agreement (Exh. 2), Hodas testified that the agreement was made in November of 1971 (R. 840). Also contradicting his earlier testimony, Hodas later testified that he terminated the partnership in January of 1972 (R. 833-34, 861-62). However, there was never a written termination agreement (R. 864-65). Upon ending the partnership,

Hodas was merely a landlord who rented to the 414 Theatre Corporation which was now owned by Gomberg and Kaplan (R. 834).

According to Hodas, the agreement was dissolved because Valentine caused "nothing but trouble" (R. 829). Hodas testified that Valentine "was drunk all the time," would beat up girls, and once broke a cash register with an iron pipe (R. 829-30). In November or December of 1971, Valentine broke the windows in the Harem (R. 852). On the following day Hodas told Valentine's common-law wife that he wanted Valentine out or he would have Valentine arrested (R. 830-31).

Hodas also testified that he had listened to Herbert Levin's testimony and it was true in all respects (R. 834). Levin had correctly testified about the meeting between the defendants and Nick Valentine at the Dixie Hotel and about Hodas' interest in the Geisha House (R. 834). On cross-examination Hodas stated that he had heard Mr. Kassner speak with Levin and he knew beforehand how Levin was going to testify (R. 842-44).

Hodas further testified that at the time of the Palace and Studio fires in May and July of 1972, he did not have an ownership interest in the Geisha House (R. 835). He also stated, in direct contradiction to the People's witnesses, that he never heard Kaplan or Gomberg discuss setting fires with Hatton, Morton or Jones (R. 835).

About one month before trial, Hatton went to Hodas' office and asked Hatton for \$100 in exchange for not testifying against him (R. 837-38). According to Hodas, he declined Hatton's offer (R. 838).

The Post-Conviction Motion and Hearing in State Court

In a motion dated February 14, 1974, Kaplan and Gomberg, who were represented by new attorneys, asked the trial court to set aside their guilty verdicts on the grounds, *inter-alia*, that they had been deprived of the effective assistance of counsel by their trial attorney's joint representation of them and their codefendant, Martin Hodas.

In an affidavit in support of his motion, George Kaplan stated that although prior to trial he had discussed with his attorneys the possibility of getting separate counsel, he had been advised that his defense and that of his codefendants would not be in conflict and that it would be unnecessary for him to obtain separate counsel (R. 1120). However, Kaplan stated that he was never advised that part of Hodas' defense would be that he was a landlord, not an owner of the Geisha House, and therefore had no motive to set fire to competitor massage parlors (R. 1120). Further, Kaplan stated that he was never advised that a pre-trial motion would be made only for Hodas, claiming a potential conflict of interest on his behalf (R. 1120). In addition, Kaplan stated that he was never told that, of the defendants, only Hodas would testify and that the potential defense witness Jerome Bayarsky would not be called to testify (R. 1121).

At a subsequent evidentiary hearing, **Jerome Bayarsky** was the only witness called on behalf of Kaplan with respect to the conflict of interest claim. Bayarsky testified that after the arsons he was employed by Kaplan and Gomberg as a part-time clerk in the operation of their massage

parlors (R. 1281-82, 1285-86). Bayarsky was a life-long friend of both Kaplan and Gomberg with whom he had grown up as a boy (R. 1295, 1300). According to Bayarsky, during the defendants' trial he appeared at the courthouse prepared to testify in their behalf (R. 1285). If called upon, Bayarsky would have testified that the money used by Gomberg to purchase Morton's plane ticket to Atlanta had been deducted from Morton's pay (R. 1286-88). Bayarsky also told attorney Kassner that he thought Hodas was still a partner of the other defendants at the time of the fires because even after the fires, Bayarsky would bring Hodas a share of the money from the massage parlors every week in an envelope (R. 1285, 1297).

According to Bayarsky, Hodas then told Kassner not to call Bayarsky as a witness since Hodas' own testimony would be better (R. 1285-86, 1289, 1301, 1304). Kassner then told Bayarsky that he would not be called as a witness (R. 1301-04). Although both Gomberg and Kaplan were present during this conversation, they did not say anything (R. 1286, 1304-06).

The State Trial Court's Decision on the Post-Conviction Motion

On April 19, 1974, prior to the imposition of sentence, Justice Denzer, in a lengthy opinion, denied the defendant's motion (R. 1671-1707). On three separate grounds, the court rejected defendant's claim that he had been deprived of the effective assistance of counsel. First, the court found that no conflict developed at trial among the defendants (R. 1676-82). Second, the court found that even if a conflict had developed at trial, no prejudice resulted

(R. 1683). Third, the court held that prior to trial, the defendants were fully aware of the possibility of a conflict, but nonetheless chose to continue their joint representation (R. 1683-89).

The trial court's lengthy opinion will be referred to and discussed more fully in the body of the argument in this brief.

The Decisions of the Appellate Division and the State Court of Appeals

On appeal of his judgment of conviction, Kaplan raised the conflict of interest issue in the Appellate Division, First Department, of the Supreme Court of the State of New York. On December 3, 1974, that court unanimously affirmed, without opinion, the judgment of conviction. *People v. Gomberg (and Kaplan)*, 46 A.D. 2d 850 (1st Dept. 1974).

Kaplan appealed to the New York State Court of Appeals and argued, as he did in the trial court and the Appellate Division, that he was prejudiced by a conflict of interest at trial and that he did not knowingly and intelligently waive his right to effective assistance of counsel. Addressing itself only to the issue of whether defendant waived his right to representation by counsel free from any conflict of interest, the Court of Appeals unanimously held that:

The defendants, after being alerted to the existence of a possible conflict of interest and given the opportunity to retain separate counsel, consented to continued representation by (their attorneys). By his

consent which was knowingly and intelligently made, defendant Kaplan, as well as defendant Gomberg, waived any claim of prejudice resulting from the joint representation. *People v. Gomberg (and Kaplan)*, 38 N.Y. 2d at 316, *supra*.

The District Court Decision on the Petition for a Writ of Habeas Corpus

Subsequent to his state appeals, Kaplan sought a writ of habeas corpus in the United States District Court for the Southern District of New York. In his petition, Kaplan made the same claims as he did in the state courts. Relying upon the record in the state courts and upon the affidavits of counsel in the District Court, on January 3, 1977, Judge Goettel agreed with the findings of the state trial court and denied, without a hearing, Kaplan's petition (A. 2-16). First, the Court held that Kaplan and his codefendants' interests were so intertwined that no conflict or prejudice resulted from their joint representation at trial. Second, the District Court found that Kaplan made a knowledgeable decision in being represented by the same attorneys as his codefendants. After proper and reasonable inquiry by the state trial court, he knowingly and intelligently waived his right to be represented by a lawyer who did not also represent a codefendant.

POINT I

Appellant Kaplan was not deprived of the effective assistance of counsel or prejudiced by any conflict of interest caused by his trial attorney's representation of him and an acquitted codefendant [answering Appellant's Brief, Point II, at 34-43].

Appellant contends that he was denied the effective assistance of counsel because his attorney also represented a codefendant, Martin Hodas, who was acquitted at trial. Specifically, Kaplan argues that he was prejudiced by a conflict which arose at trial between his defense and that of Hodas. The state trial court, after a full and fair hearing, found no conflict. Although the New York State Court of Appeals did not reach the issue of whether there was a conflict,* the Federal District Court, after reviewing the record in the state court also concluded that no conflict of interest developed at trial. Since Kaplan does not now challenge the adequacy of the evidentiary hearing afforded him in state court, the findings of the trial court and the District Court should now be entitled to great weight. 28 U.S.C. §2254(d). See *LaValle v. Delle Rose*, 410 U.S. 690 (1973) (per curiam); *Winford v. Swenson*, 517 F.2d 1114, 1118 (8th Cir. 1975); *United States ex rel. Sabell v. Follette*, 432 F.2d 572 (2d Cir. 1970), cert. denied, 401 U.S. 920 (1971). In any event, their findings were correct.

* The Court of Appeals did not need to reach the question of whether there was a conflict of interest, because it found that petitioner waived any such claim. *People v. Gomberg (and Kaplan)*, 38 N.Y. 2d at 316. Contrary to Kaplan's assertion (Appellant's Brief, at 39) there was never an explicit, or for that matter implicit, finding by the New York Court of Appeals that there was a conflict of interest at trial. See *People v. Gomberg (and Kaplan)*, 38 N.Y. 2d 307 (1975). Justice Denzer's finding that there was no conflict of interest at trial was the only specific finding made in the state courts.

In this Circuit, a court must find that a defendant has suffered from "some specific instance of prejudice, some real conflict of interest, resulting from a joint representation" before it will be said that he was denied the effective assistance of counsel. *United States v. Carrigan*, 543 F.2d 1053, 1055 (2d Cir. 1976); *United States v. Mari*, 526 F.2d 117, 119 (2d Cir. 1975); *United States v. Vowteras*, 500 F.2d 1210, 1211 (2d Cir. 1974); *United States v. DeBerry*, 487 F.2d 448, 552 (2d Cir. 1973); *United States v. Wisniewski*, 478 F.2d 274, 281 (2d Cir. 1973); *United States v. Lovano*, 420 F.2d 769, 773 (2d Cir. 1970), *cert. denied*, 397 U.S. 1071 (1970). Although "the precise degree of prejudice sustained" need not be detailed [*Glasser v. United States*, 315 U.S. 60, 75-76 (1942)], where there is no prejudice shown, joint representation is not impermissible. *Id.* at 75-77; *United States v. Alberti*, 470 F.2d 878, 881 (2d Cir. 1973). The record reveals that Kaplan was not prejudiced by any conflict of interest in his joint representation.

As appellant Kaplan concedes, the People's evidence against all three defendants, as detailed in the testimony of the three accomplices, was consistent in establishing the defendants' common interest and scheme in setting the fires at the two massage parlors. *See* Appellant's Brief at 12. Since the testimony of the People's witnesses consistently linked all three defendants equally to the planning and ordering of the fires, it was necessary for the defense to discredit this testimony in order to prevail. Thus, the primary defense of all three defendants—Kaplan, Gomberg, and Hodas—was to prove the incredibility of the People's witnesses. Surely, as Kaplan himself concedes, "all three defendants had a common interest in attacking the credibil-

ity of the prosecution witnesses." See Appellant's Brief at 36.

At trial, the defendants presented a unitary defense. They attacked the credibility of the People's witnesses. Their attorney pursued that course vigorously, on behalf of all, through his extensive cross-examination, use of prior inconsistent statements, and exploration of the witnesses' prior criminal backgrounds. Each prosecution witness was thoroughly cross-examined by defense counsel in an attempt to impeach his credibility in general and undermine his testimony against all three defendants (R. 54-125, 132-37, 174-363, 385-93, 428-603, 518-20, 634-95, 702-05, 728-29, 737-40). In both his opening statement [R. 18-23] and his summation [R. 896-949], defense counsel told the jury that the prosecution witnesses were unbelievable and had implicated the three defendants because they [the accomplices] were guilty of having set the fires and sought to place the blame elsewhere.

After listening to the evidence at the trial and post-conviction hearing, Justice Denzer stated:

In few cases that I have seen or can visualize has a greater community of interest existed among defendants than in the one we are now considering.

The People's evidence was monotonously consistent in indicating the equal responsibility of all three men.

The testimony throughout referred to Hodas, Kaplan and Gomborg—to Marty, George and Jerry.

When one made an incriminating statement or threat, or gave a direction indicating culpability, the others were almost invariably present and lent their assent.

When an act was described that was indicative of responsibility for the fires, it was linked jointly to all three; not isolated upon one defendant or another. There is no question of that.

The defendants' interests were identical insofar as their attack upon the People's evidence was concerned, namely to discredit the character and motives and veracity of the prosecution witnesses; in short, to discredit their testimony.

No defendant could rest comfortably, with any part of the People's case; for each it was imperative to show that it was unworthy of belief (R. 1676-77).

As part of the joint defense, one of the defendants, Martin Hodas, testified. Hodas testified that none of the defendants participated in the massage parlor arsons (R. 835). Through his testimony, the defense also brought out evidence directly impeaching the credibility of some of the People's witnesses (R. 829-30, 837-38, 852). In addition, Hodas claimed that he had no motive to set the Palace and Studio massage parlors on fire. In support of this defense Hodas presented evidence, which was contradicted, that he was merely a landlord of the Geisha House and thus realized no monetary gain from setting fire to competitor massage parlors.

Contrary to petitioner's assertion, Hodas' testimony did not create a conflict between him and the other defendants. Since the People's testimony uniformly detailed that all three defendants participated in ordering and arranging the arsons, Hodas' testimony, including proof of his lack of motive, not only helped him but also helped the others. Surely, if the jury concluded that the testimony of the People's witnesses concerning Hodas' involve-

ment was false, it would be more difficult to conclude that the testimony against Kaplan and Gomberg was true. Thus, evidence of Hodas' lack of motive as well as the other evidence brought out during his testimony, did what the defendants needed to do most in order to prevail—undermine the credibility of the People's witnesses. As Justice Denzer observed:

Hodas, if believed, exculpated not only himself, but Kaplan and Gomberg as well. His testimony was intended to do exactly what Kaplan and Gomberg were required to do to prevail to discredit the prosecution witnesses (R. 1679).

After reviewing the record, Judge Goettel reached the same conclusion:

If the jury believed that Hodas had taken no part in ordering and arranging the arsons this would undermine the prosecution's case against all three defendants in its entirety since it was crucial to the consistency of the state's evidence that all the events be linked to all the defendants. *Kaplan v. Bombard*, 76 Cir. 2435, Slip Op. at 14 (S.D.N.Y. January 3, 1977) (A. 15).

Nonetheless, Kaplan argues that Hodas' claim of lack of motive harmed petitioner because it reinforced to the jury that Kaplan had a motive to set the fires. This argument is based entirely upon speculation about what the jury's concerns during deliberation might have been. But even assuming that a claim by Hodas that he lacked a monetary motive to set the fires would have caused the jury to believe that Kaplan, by contrast, had such a motive, this "harm" to Kaplan was not caused by that fact that he and Hodas had the same lawyer. Indeed, if Kaplan and

Hodas had had separate lawyers, Hodas' alleged lack of monetary motive would have been emphasized with equal, if not greater vigor. Concededly, Hodas' claim that he had no motive to set fires placed him in a different position than the other defendants. However, this difference alone did not create a conflict of interest. "There are many situations short of those presenting a conflict of interest, where codefendants rest on somewhat different footing in the same case." See Opinion of Denzer, J. (R. 1679-80). By merely pointing to a difference in the claims made at trial, Kaplan does not, especially in view of the community of interests among himself and his codefendants, establish that there was a conflict of interest. The court reports are replete with cases in which codefendants, who had different defenses and were represented by joint counsel, did not have conflicts of interest. See generally, 34 A.L.R. 3d 470, 482-85, 492-93. See also *United States v. Lovano*, 420 F.2d 769 (2d Cir. 1970), *cert. denied*, 397 U.S. 1071 (1970) (no conflict between codefendants who were jointly represented in a counterfeit prosecution where one defendant claimed a defense of entrapment and the other denied his guilt); *United States v. Sheiner*, 410 F.2d 337 (2d Cir. 1969) (no conflict between codefendants who were jointly represented in prosecution involving fraudulent altering and sale of coins where one defendant asserted a defense of lack of guilty knowledge of the fraud which was not available to codefendant); *United States v. Armone*, 363 F.2d 385 (2d Cir. 1966), *cert. denied*, 385 U.S. 957 (1966) (no conflict between codefendants where the defendant, who was the only one to call character witness, argued on appeal that independent counsel would have called more character witnesses if it had not reflected adversely on codefendants who had none).

Differences in defenses among codefendants will result in a conflict of interest only when the individual defenses "run afoul of each other." *People v. Gombert (and Kaplan)*, 38 N.Y. 2d 307 (1975); *People v. Gonzalez*, 30 N.Y. 2d 28, 34 (1971), *cert. denied*, 409 U.S. 859 (1972); see *Chavira Gonzales v. United States*, 314 F. 2d 750, 752 (9th Cir. 1963). Defenses may "run afoul" when one defendant attempts to exculpate himself by shifting the blame on his codefendants. See *United States v. DeBerry*, 487 F.2d at 453, *supra*; see also *United States v. Marshall*, 488 F.2d 1169, 1191 (9th Cir. 1973). Similarly, defenses may "run afoul" when one defendant takes the stand and his testimony, although exculpatory, contradicts the exculpatory statements made to the police by a codefendant who does not testify at trial. See *United States v. Carrigan*, 543 F.2d at 1056-57. Here, Kaplan's defense did not "run afoul" of Hodas' defense because there was no attempt by Hodas to shift the blame for the arsons onto Kaplan; nor did Hodas' testimony contradict or conflict with the defense of his codefendants (A. 12-13). See *Kaplan v. Bombard*, Slip. Op. at 12-13, *supra*.

In addition to those allegations of a conflict of interest discussed above, appellant lists several other examples of how he was allegedly prejudiced by joint representation. See Appellant's Brief at 36-38. Rather than demonstrating prejudice from joint representation, these other examples reveal sound tactical choices by defense counsel, made in an attempt to present a unified defense discrediting the People's witnesses. For instance:

1. Kaplan argues that the alleged conflict of interest was prejudicial to him because Hodas was called as a de-

fense witness and petitioner was not. However, as the state trial court noted, despite Kaplan's assertion in his post-trial affidavit that he wanted to testify in his own behalf, it was "highly doubtful" that he would have exposed himself to cross-examination, even if he had separate counsel (R. 1680). As both the state trial court and the Federal District Court observed, there were sound tactical reasons for calling only Hodas as a witness (A. 16). *Kaplan v. Bombard*, Slip Op. at 15, *supra*. The record is barren of any indication that either Kaplan or Gomberg could have added anything to Hodas' testimony. Yet, the risk to the defense of their testimony was great. Kaplan and Gomberg both had prior criminal records and thus, if they testified, were subject to impeachment (R. 1680). *Id.* Hodas had no prior convictions and thus was less vulnerable on cross-examination. The decision to call only Hodas as a witness not only avoided exposing the defendants to impeachment by prior convictions, but it avoided the risk that Hodas might have been contradicted (A. 16). *Kaplan v. Bombard*, Slip Op. at 15, *supra*. And, as we have already seen, it was important to all the defendants that Hodas be believed.

Surely, petitioner's hindsight contention that he would have taken the witness stand must now be viewed with considerable suspicion. As this court noted in *United States v. Wisniewski*, 478 F.2d 274 (1973):

When a trial culminates in a verdict of guilty the temptation is great for a defendant, armed with hindsight, to claim that his lawyer's strategy in not permitting him to run the cross-examination gauntlet was motivated by a conflict of interest. * * * However, in the absence of objective evidence of corroboratory circumstances, such post-trial claims must be viewed with some suspicion * * *. 478 F.2d at 284.

2. Next, Kaplan contends that he was prejudiced by the failure of his attorney to call Jerome Bayarsky as a witness and that this failure "was very possibly motivated" by a conflict of interest. *See* Appellant's Brief at 38. This speculative contention is based on two incorrect assumptions—first, that Bayarsky's testimony would have helped Kaplan and second, that it would have hurt Hodas.

With respect to the first of these incorrect assumptions, Bayarsky's testimony would not have been very helpful to Kaplan. If his post-trial testimony is believed, Bayarsky could have testified at trial that part of the money paid by Gomberg to Morton, for Morton's plane fare to Atlanta, came from deductions in Morton's salary (R. 1286-88). However, Bayarsky had nothing to say about the purpose of the payment and so could not refute the State's evidence that the payment was for Morton's part in the arson of the Palace massage parlor. Moreover, Bayarsky would not have explained the additional payments made to the other accomplices, Hatton and Jones, for their roles in the Palace and Studio arsons.

Kaplan also assumes, incorrectly, that Bayarsky was not called to testify because his testimony would have hurt Hodas. The theory is that Bayarsky would have testified that Hodas was a partner of Kaplan and Gomberg and thus would have differed with Hodas' testimony to the contrary. Bayarsky believed that Hodas was still a partner after the arsons because he (Bayarsky) would deliver each week to Hodas a share of the money from the Geisha Massage Parlor (R. 1285, 1297).

However, if called to testify it is most unlikely that Bayarsky would have contradicted Hodas' claim that he was

merely a landlord of the Geisha Massage Parlor. Bayarsky had no basis for a conclusion to the contrary. Bayarsky was not privy to the partnership agreement of the Geisha, and he served only as a part-time messenger clerk. More importantly, Bayarsky did not even work for the defendants until after the arsons. Therefore, he could not testify about the defendants' business relationship prior to the arsons and thus could not shed light on their motive to set the fires. Moreover, even if Bayarsky had testified that he brought Hodas money from the Geisha House after the arsons, this testimony would have been consistent, not contradictory, with Hodas' story that he was only paid rent for the Geisha House. Thus, Bayarsky's testimony would not have hurt Hoda.

Furthermore, even if Bayarsky could have contradicted Hodas' contention, his testimony would have hurt all three defendants and not merely Hodas. For it was in the best interest of all three defendants not to contradict or impeach Hodas' testimony. As we have already shown, his testimony, if credited, contradicted the People's entire case. Any division or break in the defendant's defense would hurt all three defendants equally. Thus, even if petitioner had separate counsel, it is doubtful that he would have called Bayarsky as a witness at the risk of undermining the entire defense.

Finally, Bayarsky testified that both Kaplan and Gomberg were present when the decision not to call him was made (R. 1304). Yet, neither defendant complained, even though they knew Hodas would be called to testify instead (R. 1304). This acquiescence should certainly preclude the

defendants from now claiming prejudice because of that decision.

In sum, the record in this case fails to demonstrate that appellant suffered any actual prejudice, as a result of any real conflict of interest caused by his attorney's representation of him and his codefendants. Rather, as Justice Denzer observed:

[T]he contention of prejudice now presented appears highly artificial and contrived savoring strongly of an after the fact concoction placing great stress upon matters having no real significance at the trial. (R. 1683).

POINT II

Appellant knowingly and intelligently waived any claim of possible prejudice from joint representation [answering Appellant's Brief, Point I, at 23-24].

Kaplan knowingly and intelligently chose to be represented by a lawyer who represented his codefendants at trial. Thus, he should not be heard to complain that he was prejudiced by the joint representation, even assuming that that was the case.

In July of 1973, George Kaplan, Jerry Gomberg and Martin Hodas were indicted and arrested for the arson of the Palace and Studio massage parlors. At their arraignment, and at every court appearance thereafter, they were represented by the law firm of Kassner and Detsky.

In an omnibus motion dated August 20, 1973, all three defendants, through their attorneys, moved for discovery

and additionally requested that the indictment be dismissed (A. 30-44). In his supporting affidavit (A. 45-51), attorney Detsky stated that the information requested was essential, because, among other things, it would help him and Mr. Kassner determine whether there was any conflict in their joint representation of the three defendants. However, Detsky stated, under oath, that "[a]t the present time we do not see a conflict" (A. 50). On September 12, 1973, Justice Postel granted the discovery motion, in part, and denied the motion to dismiss the indictment (A. 52-53).

In a motion dated October 5, 1973, Detsky, on behalf of the defendant Hodas, moved for an order permitting the inspection of Grand Jury minutes and for dismissal of the indictment on the ground that the evidence submitted to the Grand Jury was insufficient. Alternatively, Detsky requested that the action against each of the defendants be severed (A. 54-55). In his supporting affidavit, Detsky stated, under oath, that he did not "concede or recognize that there is any conflict in representing all three defendants at this time" (A. 57). In support of his application for a severance, Detsky stated in conclusory fashion that the evidence against each of the defendants might be different and prejudicial to the other defendants (A. 58-59). However, at no time did Detsky specify the basis for his conclusion. Ultimately, the motion was denied by Justice Oliver Sutton.

On November 8, 1973, the case was marked ready for trial and carried on that basis until December 12, 1973 when the trial commenced. At no time did any of the defendants express dissatisfaction with their representation.

Immediately before trial on December 12th, Detsky requested an adjournment until January, but the request was denied (A. 65). Then, the trial judge, Justice Richard Denzer, on his own initiative, inquired whether the defendants were satisfied with their counsel or whether the defendants thought that their joint representation would result in a conflict of interest (A. 63). In the presence of the defendants, attorney Detsky and the assistant district attorney, the court stated its desire

to make certain at this point, that you [the defendants] don't regard your defense as being in conflict or that there might be a conflict of interest with respect to any attorney that represents all three of you (A. 63).

Hodas assented when asked if he wanted Kassner's continued representation. Kaplan did not respond. Gomberg at first said he did not understand the court's question. The court then more fully explained the problem for the benefit of the three defendants:

I just want to make certain that in your mind, there is no reason that one attorney should represent all three of you; that the attorney won't be put in a position of having to take a course of action which is favorable to one, but not to another. I just want to make sure you don't feel that way. Apparently you don't if you retained the same attorney; do you understand? (A. 63-64).

Gomberg said that he understood the court's explanation, but opined "maybe it is better for us to get another lawyer" (A. 64). However, when asked if he wanted to be represented by someone other than Kassner, Gomberg said, "I would like to talk it over with another lawyer" (A. 64).

Gomberg did not suggest that there was any conflict of interest; nor did he say that he did not want the firm of Kassner and Detsky to continue their representation. Kaplan said nothing.

The prosecutor then indicated his belief that the defendants were attempting to stall the commencement of a trial that had already been delayed for several months (A. 64-65). The prosecutor also noted that not once during the time the defendants were represented by the firm of Kassner and Detsky did any of them indicate dissatisfaction with their representation (A. 64). The court asked Detsky whether any of the defendants ever indicated to him that there might be a conflict and that they wanted another attorney (A. 65). Detsky said, "No," but by alluding to his motion made on October 5th, indicated that he had always been mindful of the possibility.

The court asked whether Detsky had ever suggested to the defendants that they might retain other counsel because of the possibility of a conflict of interest (A. 66). Detsky informed the court that he had discussed the problem with the defendants four or five days earlier and had suggested that one or the other of the defendants get separate counsel (A. 66). However, all three defendants rejected the suggestion and "said they had confidence in our firm to handle it" (*Id.*). In the presence of the defendants, the court inquired further, "(t)he way the situation stands is that you advised them of this and they told you they didn't want to hire other counsel?" (R. 23a). Detsky replied, "That's correct" (*Id.*).

In the brief colloquy that followed and to which none of the defendants took exception, Detsky stated that, al-

though the conflict of interest question had bothered him, he saw no conflict (R. 24a). The court, addressing the defendants and their attorney, then stated:

I think I am going to cut this discussion short. We will proceed with the trial. If any of the defendants wish, either today or any other day, to bring in other counsel in the case, they are at liberty to do so. If any defendant feels at some point that there is a conflict of that nature, he may have other counsel (A. 68).

At the prosecutor's request, the court again asked Detsky whether he thought there was any conflict. Detsky said, "I don't feel there is one and I have said that in my affidavit" (A. 68-69). However, Detsky said that he did not know whether an unexpected conflict might arise during the course of trial (A. 69). The court repeated its earlier statement that the defendants were free at any time to bring in new counsel. Addressing the defendants, the court stated, "You are aware of it [the possibility of a conflict] and you can be thinking of the matter and if something does arise, I will be happy to have other counsel enter the case in the course of trial" (A. 69).

Kaplan was present during this extended discussion of the conflict question and remained silent throughout. He did not object to the joint representation or indicate that he thought there was or might develop a conflict as a result of his joint representation. Moreover, as attorney Detsky indicated, Kaplan had consented to the joint representation at a meeting held only days before trial.

Kaplan now argues that the trial court's inquiry was inadequate and that he did not knowingly and intelligently

waive his right to be represented by attorneys who were free from a possible conflict of interest which might prejudice his defense. Assuming *arguendo* that Kaplan's defense was prejudiced because of some conflict of interest, Kaplan knowingly and intelligently waived any such claim of prejudice. Kaplan was fully informed of the possibility of a conflict of interest by both his lawyer and the state trial judge. Although given the opportunity to obtain and consult new counsel, he did not do so.

A defendant may waive his Sixth Amendment rights just as he may waive any other constitutional right, provided that the waiver is both knowing and intelligent. See *Faretta v. California*, 422 U.S. 806 (1975); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1974); *Glasser v. United States*, 315 U.S. 60, 70-71 (1942); *Johnson v. Zerbst*, 304 U.S. 458 (1973); *United States v. Arredo-Sarimiento*, 524 F.2d 591 (2d Cir. 1975); *United States v. DeBerry*, 487 F.2d 448 (2d Cir. 1973). The record in this case is clear that the defendant did knowingly and intelligently waive his Sixth Amendment right to separate counsel free from any conflict of interest. All the courts which have reviewed this record, the state trial court, two state appellate courts, and the Federal District Court, have agreed.

Nonetheless, appellant argues that a knowing and intelligent waiver cannot be found in the record, because the trial court did not question him directly and elicit his personal responses as to his understanding of a potential conflict of interest from joint representation. This argument places form over substance. In effect, appellant's contention is that regardless of what the record as a whole

shows about waiver, a court should never be allowed to find a waiver unless there has been a personal interrogation of the defendant. A court should not be allowed to rely on the statements of defense counsel, even when, as here, those statements were made in open court and in the presence of an intelligent and competent defendant. Thus, appellant would have this court ignore the record of his knowing and intelligent waiver. The state trial court, Appellate Division, and the Court of Appeals as well as the Federal District Court rejected such an invitation.

In *People v. Gomberg (and Kaplan)*, 38 N.Y. 2d at 307, *supra*, the New York Court of Appeals set for the state trial courts the guidelines for inquiring into possible conflicts, and for insuring that any waiver of a Sixth Amendment right was knowing and intelligent. The Court of Appeals ruled that trial courts "should be satisfied, where there is joint representation, that the defendant's decision to proceed with his attorney is an informed decision." *Id.* at 313. The *Gomberg* decision did not say that a trial court must question the defendants personally about their awareness of the potential risks of joint representation. Rather, the Court of Appeals in *Gomberg* ruled that in carrying out their responsibilities, state trial courts should "place great weight upon counsel's representations that there is no conflict in his joint representations. Similarly, the court may rely upon counsel's assurances that he had fully discussed the potentiality of conflict with his clients and received their continued approbation." *People v. Gomberg (and Kaplan)*, 38 N.Y. 2d at 314, *supra*. In its opinion the District Court recognized and accepted that state trial courts might properly rely on an attorney's assurances.

There are arguments, of course, in favor of requiring personal interrogation of a defendant before finding a waiver of the right to separate representation. Obviously, personal interrogation enhances the probability of a knowing and intelligent waiver; the court can hear from the defendant himself. On the other hand the rationale behind permitting trial courts to rely upon the representation of counsel is also sound. If the trial court interrogates the defendant, it may well interfere with the confidential communications between lawyer and client. As the New York Court of Appeals warned in *Gomberg*:

Since the right to effective assistance of counsel and the right to retain counsel of one's choice may clash when a retained attorney is involved in an apparent conflict of interest, a Trial Judge has a duty to protect the right of an accused to effective assistance of counsel. At the same time, a court should not arbitrarily interfere with the attorney-client relationship. *People v. Gomberg (and Kaplan)*, 38 N.Y. 2d at 313.

Moreover, given an attorney's ethical obligation as an officer of the court, reliance upon his assurances is appropriate. As the Court of Appeals recognized in *Gomberg*:

Attorneys are under an ethical obligation to disclose to their clients, at the earliest possible time, any conflicting interests that might cloud their representation. Disclosure alone is not enough. The lawyer may not act for the client unless the client has given his informed consent to further representation. (Code of Professional Responsibility, EC 5-16, DR 5-101 (A); DR 5-105 (B), (C); ABA Standards relating to the Defense Function, §3.5 (a), (b)). 38 N.Y. 2d at 314.

Since "(i)t may properly be assumed that an attorney will not perjure himself, nor deliberately act in violation of

the Code of Professional Responsibility" (*People v. Gomberg (and Kaplan)*, 38 N.Y. 2d at 314, *supra*; see also *United States v. Wisniewski*, 478 F. 2d 274, 285 (2d Cir. 1973), there are circumstances when it is appropriate for trial courts to rely upon counsel's representations that he had discussed the possibility of a conflict with his clients and they have consented to his continued representation.

Thus, there is room for disagreement about which is the better procedure for insuring that defendant's waiver is knowing and intelligent. Indeed, there have been differences even within the same jurisdiction, concerning whether the trial judge can rely on counsel's representations. Compare *United States v. Mari*, 526 F. 2d 117, 119 (2d Cir. 1975); *United States v. DeBerry*, 487 F. 2d 448, 452 (2d Cir. 1973) with *United States v. Wisniewski*, 478 F. 2d 274, 284 (2d Cir. 1973); *United States v. Sheiner*, 410 F. 2d 337, 343 (2d Cir. 1969); *United States v. Armone*, 363 F. 2d 385, 406 (2d Cir. 1966), *cert. denied, sub nom. Viscardi v. United States*, 385 U.S. 957 (1966).^{*} See also *Hill v. State*, 316 A.D. 2d 557, 558 (Del. Sup. Ct. 1974); *Kaplan v. United States*, 375 F. 2d 895, 897-98 (9th Cir. 1967). There is, how-

^{*} Defendant's discussion of *Wisniewski*, *Sheiner* and *Armone* (Appellant's Brief, at 31-33) seems to contradict his earlier argument that under no circumstances may a court rely on the representations of counsel. *Armone* says, as defendant recognizes, that a trial court must be allowed to accept an attorney's representations on the issue of a conflict of interest, "at least absent unusual circumstances." This Court did not explain what would constitute "unusual circumstances." Appellant suggests that there are "unusual circumstances" in this case.

However, nothing about the instant case would suggest "unusual circumstances" requiring personal interrogation of Kaplan. He was not suffering from any physical or mental impediment which would impair his ability to understand or appreciate the discussion between the court and his attorney. Nor has there ever been a claim that Kaplan's attorney was lying or misrepresenting to the trial court his discussions with his client.

ever, nothing in the language of the Sixth Amendment, the leading Supreme Court decision in *Glasser v. United States*, 315 U.S. 60 (1942), or any case of which we are aware that prescribes, as a matter of constitutional law, personal interrogation of defendant. *See, generally, United States v. Mandell*, 525 F. 2d 671, 675 n.5, 676 n.7 (7th Cir. 1975); *United States v. Foster*, 469 F. 2d 1, 4-5 (1st Cir. 1972); *LaFleur v. Hall*, 383 F. Supp. 1188, 1190 n.3 (D.C. Mass. 1974).

The issue, then, for this Court is not whether New York's procedure as stated in *Gomberg* is advisable or preferred, but whether the record in this case shows a knowing and intelligent waiver. It does.

Here, there was ample evidence in the record, even without a personal interrogation of Kaplan, that he had knowingly and intelligently waived his right to effective assistance of counsel.

First, he was adequately alerted by both the trial court and his own attorney of the possibility of a conflict of interest arising from his joint representation. Immediately prior to trial the court, directly addressing the defendants, explained what was meant by a conflict of interest (A. 63-64). Three or four days before trial his own attorney explained to him and his codefendants the possibility of a conflict (A. 66). Even in his own affidavit in support of the post-trial motion to set aside his verdict, Kaplan conceded that he had discussed with his attorney the possibility of getting separate counsel (R. 1120, 1686).

Second, Kaplan was present and heard his attorney represent to the court that after discussing the conflict

question, Kaplan had consented to his continued representation (A. 66). Although he had the opportunity, Kaplan did not disagree with this statement.

Third, the trial court gave Kaplan the opportunity to retain new counsel either for representation or consultation, at any time during the trial, if petitioner believed that any conflict or prejudice might arise as a result of joint representation (A. 68-69). Although Kaplan, who was free on bail, had the means and opportunity to consult and retain new counsel, he did not do so. Apparently, he was quite satisfied with his representation. Kaplan, an experienced businessman with prior acquaintance with the criminal justice system, had retained the firm of Kassner and Detsky from the time he was arrested on July 13, 1973. Indeed, for at least two years prior, Kassner and Detsky had represented Kaplan and his codefendants on other matters (R. 750).

Fourth, although given the opportunity during the pre-trial proceedings and the trial itself, Kaplan never once objected to the joint representation or indicated that a conflict might arise.

Thus, having been alerted to the existence of a possible conflict of interest, having heard his attorney represent to the court that he had expressed his consent to continued representation and having been given the opportunity to retain separate counsel, Kaplan "knowingly and intelligently waived any claim of possible prejudice resulting from joint representation." *People v. Gomberg (and Kaplan)*, 38 N.Y. 2d at 316, *supra*.

Glasser v. United States, 315 U.S. at 60, *supra* provides a useful contrast to the instant case. In *Glasser*, several men were charged with conspiracy to defraud the United States government. On the day that jury selection began, a codefendant's attorney was relieved and the attorney whom Glasser had retained was assigned by the court to represent the codefendant as well. Glasser personally objected. At no time did Glasser's attorney represent to the court that he had discussed the possibility of a conflict with his client and that his client consented to being jointly represented. In the absence of these representations and in view of the facts that Glasser was forced to share his attorney on the day trial began and that a conflict of interest arose at trial, Glasser's waiver of his right to separate representation was not lightly to be implied.

Here, the circumstances were quite different. Kaplan had retained the firm of Kassner and Detsky. The defendant was not assigned a lawyer with whom he found fault. His chosen attorney was not forced to undertake the additional responsibility of representing someone who counsel or petitioner believed to have conflicting interests. Rather, Kaplan discussed the possibility of a conflict with his attorney prior to trial and his attorney represented to the trial court, in Kaplan's presence, that petitioner wanted the same attorney as his codefendants.

In sum, even if appellant was prejudiced by some conflict of interest in his joint representation, he knowingly and intelligently waived this claim.

POINT III

Appellant is not entitled to a remand for evidentiary hearing before the District Court [answering Appellant's Brief, Point III, at 43-44].

In its opinion affirming Kaplan's judgment of conviction, the New York State Court of Appeals referred to defendant as an "intelligent and perceptive" businessman. *People v. Gomberg (and Kaplan)*, 38 N.Y. 2d at 315, *supra*. The District Court, in denying the petition for a writ of habeas corpus, made passing reference to this characterization of Kaplan (A. 10). In his papers before the District Court, Kaplan's lawyer had alleged that his client had a sixth grade education and had worked for many years as a bouncer and boxer. The state did not dispute this allegation and petitioner did not request a hearing to determine whether he was an "intelligent and perceptive" businessman or to determine any other fact. Now, for the first time, Kaplan requests a hearing to determine whether he has been accurately characterized as an "intelligent and perceptive" businessman.

Even beyond the fact that Kaplan did not request a hearing in the District Court, he would not be entitled to a hearing on the fact he wants determined. The question of whether Kaplan waived his Sixth Amendment rights [See Point II] turns not on whether he was an "intelligent and perceptive" businessman but rather whether he was intelligent and competent enough to make a knowing waiver. On this ultimate issue, the District Court had ample basis on which to decide. In addition to defendant's allegations

that he was a boxer and bouncer with a sixth grade education, the District Court had before it the transcript of the state court proceedings. The state court record included extensive testimony of Kaplan's conversations and activities as a manager of massage parlors, and his involvement in arranging and planning the elimination, through arson, of his competitors in the massage parlor industry. Furthermore, the state trial judge and the federal District Court knew that Kaplan was familiar with the criminal justice system because he had been a defendant several times.

Kaplan has never, and does not now, challenge the adequacy or fairness of the state proceedings on the issue of his capacity to waive his Sixth Amendment rights. He did not ask for a hearing on this issue in the District Court. In fact, he did not even allege in his papers that he was incapable of making an intelligent waiver. He is, accordingly, not entitled now to a remand for a hearing.

Conclusion

The order of the District Court denying the petition for a writ of habeas corpus should be affirmed.

Respectfully submitted,

ROBERT M. MORGENTHAU
District Attorney
New York County

PETER L. ZIMBOTH
RICHARD H. GIRGENTI
Assistant District Attorneys
Of Counsel

Service of 3 copies of the
within Brief is hereby
admitted this 15th day of
August 19 77

Signed Stewart J. Hyman by
Selma F. Traub
Attorney for Petitioner Appellant